IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-6769

LEROY BATES,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent respectfully submits that it is opposed to the issuance of a writ of certiorari in the within cause for the reason that the Supreme Court of Ohio has decided the federal question at issue in accord with the applicable decisions of this court.

OPINIONS BELOW

The Petition of the Petitioner correctly cites the opinions below. (Appendix B).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

As this cause progressed through the Ohio court system from the Court of Common Pleas to the Court of Appeals and to the Supreme Court of Ohio the Petiitoner failed to raise any constitutional challenge to the Ohio statutory scheme which provides for the imposition of the death penalty. Petitioner did raise and preserve, however, the issue as to the admissibility of his tape recorded statement. Accordingly, Respondents submit that the within Petition presents the following questions:

I. Whether this Court should decide federal questions raised here for the first time on review of state court decisions where Petitioner failed to raise or preserve such questions in the state courts.

II. Whether the imposition of the death penalty upon an accomplice to a gunman in a felony-murder is violative of the Eight and Fourteenth Amendment of the United States Constitution.

III. Whether Sections 2929.03 and 2929.04 of the Ohio Revised Code, which provide for the imposition of the death penalty under certain circumstances, are violative of the Sixth, Eighth, and Fourteenth Amendment of the United States Constitution.

IV. Whether a confession is admissible:

A. Where the accused is advised four separate times of his constitutional rights, including the signing of a waiver of rights form; and

B. Where the accused at no time places the police on warning that he misapprehended his rights; and

C. Where the accused is not under the influence of alcohol or drugs.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Sections 2903.01, 2929.02, 2929.03, and 2929.04 of the Ohio Revised Code are set forth in Appendix A herein.

STATEMENT OF THE CASE

On November 25, 1975, the Petitioner, Leroy Bates, was living at his sister's residence located at 2248 Wheeler Street, Cincinnati, Ohio. Ellis Shelton, a friend of Petitioner's for about six years, stopped by the Wheeler Street address to see Petitioner that afternoon.

Shelton explained to Petitioner, that he was planning an armed robbery of the Warner Tavern and that it would be necessary for him to have a gun (Transcript of Proceedings 218, 285 (hereinafter referred to as "TP")). Shelton also informed Petitioner that when he executed the robbery he would have the gun with him; that he would have ammunition for the gun; and that it would be loaded (TP 219, 232).

Shelton asked the Petitioner if he knew of anyone who had a gun and if so, whether he could obtain it. Petitioner informed Shelton that he knew someone who owned guns and that he could acquire a gun for Shelton. Pe-

titioner then telephoned a friend named Kenneth Carter who Petitioner knew, from past experience, had access to guns. Petitioner asked Carter to loan him a gun but Carter refused, and said, however, that he was willing to sell Petitioner a gun for $20 (TP 172). Petitioner agreed to this purchase price.

Later that day, in the early evening, Kenneth Carter arrived at the Wheeler Street address carrying a sawed-off, 12-gauge shotgun. Shelton met Carter on the street in front of Petitioner's sister's residence where Carter handed the gun to Shelton, who, in turn, handed $13 to Carter. The balance of $7 was to be paid to Carter at a later time. Shelton was also given three or four shotgun shells with number 5 or 6 size shot (TP 19).

After the gun transaction Shelton left the Wheeler Street address but returned later that same evening. Shelton and Petitioner then left the Wheeler Street address together and went to a wooded hillside known as "TV Hill" where they prepared for the robbery.

Shelton removed the unassembled sawed-off shotgun from a bag. The weapon, in three pieces, was then assembled by Shelton. Petitioner observed Shelton assembling the weapon and also saw that Shelton possessed several shotgun shells for the weapon (TP 290). Both men then put nylon stocking masks over their heads before they proceeded to the tavern (TP 173).

Petitioner's role in the robbery was to go behind the bar and take the money while Shelton held the shotgun on the patrons. They expected to take about $200 during the robbery (TP 173).

Upon their arrival at the Warner Tavern the pair looked in the window and saw only three persons in the bar. Pe-

titioner and Shelton then entered the tavern at approximately midnight with the Petitioner leading the way.

Lois Wells was tending bar and standing next to the cash register. Robert Schultheis was seated at the bar on a stool located in the rear part of the tavern. Lloyd Adkins, an off-duty Pinkerton guard, was seated at the bar next to the front entrance approximately 15 to 18 feet from Schultheis.

Shelton remained by the front door and the Petitioner moved to the rear area of the bar and toward the cash register in accordance with their plan. Lois Wells asked the men what they wanted. Shelton responded by raising the shotgun over the bar aiming directly at her. Wells then replied, "All right, I know what you want."

As the Petitioner started to move to Wells' side it was her intention to let him take all the money. As Wells moved toward the rear of the bar she heard Adkins say to Shelton, "Oh, no, you don't!". She then looked toward the front of the tavern where Adkins and Shelton were struggling. Wells heard Shelton shout at Adkins to get back or he would be killed. Wells then saw Shelton push Adkins off balance. Shelton then stepped back and fired the fatal shot directly at Adkins from a distance of several feet (TP 32, 52, 53, 174).

As the struggle between Adkins and Shelton was taking place the Petitioner was likewise engaged in a struggle with Schultheis. As a result of the struggle Schultheis was knocked to the floor and kicked by Petitioner. Schultheis then managed to get off the floor and move to a back room to hide the $280 that he had on his person.

Lois Wells identified the Petitioner when she was shown a police photograph (TP 58). Identification was based

on the Petitioner's build and facial characteristics that were observable through the stocking mask (TP 58).

After the shooting, Petitioner and Shelton fled the tavern. Once they returned to "TV Hill" they discarded the stocking masks, disassembled the shotgun and then went to the Wheeler Street adrress.

In the early morning hours of November 26, 1974, at approximately 1:30 A.M., Kenneth Carter received a telephone call from the Petitioner asking Carter to pick up the shotgun and informing Carter that Shelton had shot a man with the gun (TP 19). Carter refused to reclaim the shotgun as Petitioner had requested.

At approximately 2:00 p.m. on November 26, 1974, Carter saw the Petitioner and the Petitioner related to him again that they had robbed a tavern and that Shelton had shot a man (TP 20).

For two days the Petitioner secreted the murder weapon in his sister's back yard. Then he took the shotgun, wrapped in a towel secured with a string, to a wooded area in another area of the city where he threw the shotgun away (TP 175). Subsequently, the shotgun was recovered and examined by a firearms expert (TP 140).

Roughly two weeks later, on December 12, 1974, at about 3:00 p.m., the Petitioner was arrested at his sister's residence (Transcript of Motion to Suppress Hearing (hereinafter referred to as "TM") 45). He was advised that the police wanted to talk to him concerning a homicide. Petitioner indicated he would accompany the police to the detective headquarters (TM 52). They arrived at the police station at approximately 3:30 p.m.

Once Petitioner arrived at the interrogation room he was advised of his constitutional rights by Officers Frank

Sefton and Richard Burgess, who had arrested him (TM 174). Officer Burgess stated that in his opinion the Petitioner was not under the influence of drugs, that his appearance appeared normal, and that his speech was clear (TM 166-167). Officer Burgess asked the Petitioner whether he was under the influence of drugs or alcohol and Petitioner denied that he was (TM 168).

The officers then told the Petitioner that they had statements from Kenneth Carter and Frank Bates, Petitioner's brother (TM 175). At that point Petitioner became upset and did not want to talk (TM 176). Petitioner asked to see his brother and said he would talk to the police after talking to his brother (TM 177). His brother was brought to the interrogation room and denied saying anything to the police (TM 177).

As the interrogation continued Petitioner asked what he could be charged with (TM 181). Officer Burgess explained the elements of different homicides (TM 182) and told Petitioner he was facing an aggravated murder charge (TM 186).

During the interrogation with Officers Sefton and Burgess the Petitioner executed a waiver of rights which contained a full notification of his constitutional rights (TM 169). Petitioner gave no recorded statement to Officers Sefton and Burgess. They left Petitioner alone in the interrogation room for approximately forty-five minutes.

At approximately 4:30 p.m. Officer Drescher, who knew Petitioner from past experience (TM 134, 142, 145), talked to Petitioner in the interrogation room. No other officer was present. Officer Drescher started by introducing himself and orally advising the Petitioner of his constitutional rights (TM 134). At first Petitioner denied any involvement but eventually he told Officer Drescher that he was

in the Warner tavern when Lloyd Adkins was shot, that he wasn't the triggerman, and that they had intended to rob the tavern (TM 134). After about an hour of conversation with Officer Drescher the Petitioner agreed to give a tape recorded statement. At the outset of the statement, which began at approximately 6:45 p.m., the Petitioner was again advised of his constitutional rights. Officer Drescher explained that he felt the Petitioner was ready to give a statement when he, as an interrogator, felt that the Petitioner had told him the truth and would tell his side of the story in detail (TM 155).

On January 24, 1975, a two count indictment with a sepecification was jointly returned against Petitioner and Ellis Shelton charging them with aggravated murder and attempted aggravated robbery.

Separate trials were held for the co-defendants. The jury trial of Petitioner commenced on March 11, 1975, with a trial judge of the Court of Common Pleas for Hamilton County, Ohio, presiding. One week later the jury returned a verdict of guilty as charged.

In accordance with the Ohio statutes a pre-sentence investigation and psychiatric examination were ordered prior to the mitigation and sentencing hearing. After hearing all the evidence on mitigation, the trial court found that the evidence failed to show by a preponderance any mitigating circumstances. Accordingly, Petitioner was sentenced to death on July 1, 1975. On the second count Petitioner was sentenced to the Ohio Penitentiary for not less than seven years nor more than twenty-five years.

Petitioner's judgment and sentence was affirmed by the Court of Appeals, First Appellate District, Hamilton County, Ohio, on June 21, 1976. Likewise, the Supreme Court of Ohio affirmed the judgment and sentence on December 23, 1976.

ARGUMENT

I.

WHETHER THIS COURT SHOULD DECIDE FEDERAL QUESTIONS RAISED HERE FOR THE FIRST TIME ON REVIEW OF STATE COURT DECISIONS WHERE PETITIONER FAILED TO RAISE OR PRESERVE SUCH QUESTIONS IN THE STATE COURTS.

Petitioner has failed to raise or preserve the question of the constitutionality of Ohio's statutory scheme which provides for the imposition of the death penalty. The issue was never raised at trial or on appeal. For the first time Petitioner has raised the issue of constitutionality before this Court and asks this Court to grant a writ of certiorari to review the question.

Petitioner's Petition concedes that the issue of constitutionality was not considered by the Ohio appellate courts (p. 4, n. 1, Petition for Writ of Certiorari). Petitioner's bootstrap argument which reasons that because the Ohio Supreme Court impliedly approved the constitutionality of the death penalty statutes in other cases that it considered the issue in this case is totally and utterly unfounded. The fact is plain. Petitioner has never raised the issue of constitutionality of the death penalty. Plain error will not aid the Petitioner. It only applies to improper procedures. In the present case all the statutory procedures were scrupulously adhered to.

In *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969), the Court stated, "It was very early established that the Court will not decide federal constitutional questions raised here for the first time on review of state court decisions," 394 U.S. at 438. This position has been reaffirmed numerous

times by simply stating as the Court did in *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973), "We cannot decide issues raised for the first time here".

Respondent brings this issue to the Court's attention for the reason that it feels granting review based on questions presented by Petitioner's first question would only result in this Court dismissing the case for granting certiorari improvidently once a review of the record was made. Attached hereto as Appendix D is a complete list of the assignments of error and propositions of law raised by the Petitioner in the state courts.

Where federal questions are raised before this Court for the first time on review of state decisions, it is submitted that this Court should not decide those issues in this case.

II.

WHETHER THE IMPOSITION OF THE DEATH PENALTY UPON AN ACCOMPLICE TO A GUNMAN IN A FELONY-MURDER IS VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Although Petitioner did not raise this issue in the state courts, Respondent submits the following argument for the Court's consideration.

Petitioner and Ellis Shelton acted in concert with the intention of robbing the Warner Tavern. Petitioner procured the murder weapon. Shelton informed the Petitioner he would not commit the robbery unless the gun was loaded. As they readied themselves for the robbery Petitioner saw the shotgun shells in Shelton's possession.

Once they arrived at the tavern Petitioner was the first one in the door. He proceeded to head toward the cash register in accordance with their plan.

Section 2923.03 (A) (2) of the Ohio Revised Code provides, "No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: Aid or abet another in committing the offense". Section 2923.03 (F) of the Ohio Revised Code provides in pertinent part, "whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender". Thus, the Ohio law provides for Petitioner to be punished as a principal. The Supreme Court of Ohio addressed this issue in *State* v. *Perryman,* 49 Ohio St. 2d 14, 26 (1976), where the Court stated that, "The state need only prove that a principal committed the offense".

Respondent submits that Petitioner is accountable for the acts of his accomplice, Ellis Shelton. In Ohio there must be a purposeful killing during the perpetration of a felony before an accused is subject to a charge of aggravated murder. In the instant case, Ellis Shelton threatened Lloyd Adkins that he would kill him. He then stepped back and fired the sawed-off shotgun directly into the chest of Lloyd Adkins.

The State of Ohio does not seek to impose the death penalty in an arbitrary and random manner. The Ohio statutes do, however, intend to hold accountable those individuals whose actions, either individual or in concert with others, which result in the purposeful killing of a human being. It is submitted that the Ohio statutes are not unconstitutional where they provide for the death sentence to an individual who willingly engages in criminal conduct that results in the death of another.

III.

WHETHER SECTIONS 2929.03 AND 2929.04 OF THE OHIO REVISED CODE, WHICH PROVIDE FOR THE IMPOSITION OF THE DEATH PENALTY UNDER CERTAIN CIRCUMSTANCES, ARE VIOLATIVE OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Although Petitioner did not raise this issue in the state courts Respondent submits the following argument for the Court's consideration.

The primary issue presented by Petitioner is whether Ohio's statutory scheme, which imposes the death penalty, passes constitutional muster in light of this Court's most recent pronouncements on capital punishment as they relate to the Eighth Amendment. Respondent submits that the Ohio laws conform with constitutional standards as defined by this court and as applied by the Supreme Court of Ohio.

Following the decision in *Furman* v. *Georgia,* 408 U.S. 238 (1972), the Ohio legislature enacted Section 2929.02, Ohio Revised Code (Appendix A), which prescribes the death penalty or life imprisonment for the crime of aggravated murder. Sections 2929.03 and 2929.04, Ohio Revised Code (Appendix A) set forth the procedure for determining whether the death sentence is to be imposed. Aggravated murder is limited to purposeful killing as defined by Section 2903.01, Ohio Revised Code (Appendix A).

Those statutes permit the death penalty only where one or more aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The

aggravating factors include: assassination of the President, Vice-President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such office; murder for hire; murder to escape accountability for another crime; murder by a prisoner; repeat murder or mass murder; killing a law enforcement officer; and murder in the course of certain felonies.

Under the Ohio statutory scheme the trier of fact may be either a jury or, if waived, a three-judge panel. First the trier of fact is to consider whether the defendant is guilty of the charge, and if found guilty, whether he is also guilty of one or more of the specifications in the indictment.

If the defendant is found guilty of the charge and innocent of the specification, a sentence of life imprisonment is imposed. If the defendant is found guilty of the charge and guilty of one or more of the specifications, a separate hearing is held before the trial judge or three-judge panel to determine whether mitigating circumstances exist which preclude imposition of the death penalty.

A pre-sentence investigation and a psychiatric examination of the defendant are required to be made before the hearing. Copies of these rports are furnished to the prosecutor and to the defendant or his counsel. Other evidence and testimony may be sumbitted at the mitigation hearing, including any statement, sworn or unsworn by the defendant. The death penalty is to be imposed if the trial judge or the three-judge panel unanimously finds that none of the three mitigating factors have been established to exist by a preponderance of the evidence.

In considering whether one of the mitigating circumstances has been established by a preponderance of the evidence the sentencing authority is to consider the nature

and circumstances of the offense and the history, character, and condition of the defendant.

Thus, Ohio's statutes provide for a bifurcated trial, in which the issues of guilt, as to the charge and of certain statutorily defined aggravating circumstances, are determined by the jury or, if waived, by a three-judge panel, and the issues of mitigation and sentence are determined by the trial judge or by the three-judge panel.

The defendant has a direct right of appeal of his conviction and sentence pursuant to Rule 4 (B), Ohio Rules of Appellate Procedure (Appendix C). Appeals by leave are governed by Rule 5, Ohio Rules of Appellate Procedure (Appendix C). In accordance with Rule 12 (A), Ohio Rules of Appellate Procedure (Appendix C), the Court of Appeals shall rule on all assignments of error briefed by the Appellant. If the sentence of death is affirmed by a Court of Appeals, a further appeal as a matter of right may be taken to the Supreme Court of Ohio, as provided by Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution (Appendix C).

Ohio's statutory scheme differs somewhat from any of these considered by this Court in its July 2, 1976, decisions, but it is basically similar to the Georgia, Florida, and Texas statutes which this Court found to be constitutional. The Ohio statutory scheme insures that the sentencing authority is apprised of information relevant to the imposition of the death sentence and provided with standards to guide its use of the information. Guided by this information and applicable standards the sentencing authority is directed to give attention to the nature or circumstances of the crime committed and to the character or record of the defendant. Thus, Ohio's statutory scheme provides a framework in which the sentencing authority cannot wantonly or freakishly impose the death sentence.

A.

It is submitted that the mitigating circumstances enumerated in Section 2929.04 (B), Ohio Revised Code pass constitutional muster. These standards, although limited to three, echo the language found in the Model Penal Code, (Section 210.6 (4) (c) (f) (g), and Florida Statutes (Section 921.141 (6) (b) (c) (e) (f)). "While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a fact finder in a lawsuit," *Proffitt* v. *Florida*, 428 U.S. 242, 96 S. Ct. 2960, 2969 (1976). As the Court pointed out, the requirements of *Furman* are satisfied, "when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor or against imposition of the death penalty", 428 U.S. 242, 96 S. Ct. at 2969. Clearly, Ohio's statutory scheme satisfies this requirement.

The mitigating circumstances must also be considered as they have been construed by the Supreme Court of Ohio. The Supreme Court of Ohio has repeatedly held that the mitigating circumstances are not to be construed by the sentencing authority, *State* v. *Bell*, 48 Ohio St. 2d 270, 280-283 (1976); *State* v. *Black*, 48 Ohio St. 2d 262, 267-268 (1976); *State* v. *Woods*, 48 Ohio St. 2d 127, 133-138 (1976); and *State* v. *Osborne*, 49 Ohio St. 2d 135, 145-147 (1976). Through the state appellate procedure each of the mitigating circumstances in Section 2929.04 (B) has undergone close judicial scrutiny.

The mitigating circumstances in Section 2929.04 (B) channel and guide the discretion of the sentencing authority so as to avoid the arbitrary and capricious imposition of the death penalty.

Contrary to Petitioner's assertion that the mitigating

factor contained in Section 2929.04 (B) (1) is limited to mercy killing, the Respondent asserts it could apply in cases where the course of conduct engaged in by the defendant fell short of self-defense; where during the perpetration of a felony a co-defendant is killed; and where the victim is masochistic in nature in a death which results from a physical beating.

B.

At the time the mitigation hearing is conducted a defendant stands convicted of aggravated murder and at least one of the aggravating circumstances which was specified in the indictment. The introduction of mitigating circumstances has traditionally been a defense function. The mitigating circumstances listed in Section 2929.04 (B) are far broader than affirmative defenses which the defense must bear the burden of going forward with evidence in order to excuse or otherwise justify the commission of an offense.

Once the defendant stands convicted of the charge and specification, it should rightfully be his burden to present evidence as to why the punishment should be lessened. To require the defendant to do so does not infringe upon any due process rights, *State* v. *Lockett*, 49 Ohio St. 2d 48, 65-66 (1976).

Placing the burden of proof on the defendant at mitigation is clearly distinguishable from placing a burden of proof on the defendant to prove his innocence. For that reason it is submitted that the Ohio statutory procedure does not run afoul of the Due Process Clause as this Court has interpreted that clause in the cases of *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), and *In Re Winship*, 397 U.S. 358 (1970). In both those cases the Court stated it was the government's burden to prove guilt beyond a

reasonable doubt. Ohio's statutory scheme does not deviate from that command and is consistent with the Court's ruling in *Leland* v. *Oregon*, 343 U.S. 790 (1952).

C.

Although this Court has pointed out that the jury sentencing in a capital case can perform an important societal function, *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 n. 15 (1968), it has never suggested that jury sentencing is constitutionally required, *Proffitt* v. *Florida*, 428 U.S. 242, 96 S. Ct. 2960, 2966 (1976).

Pursuant to the Ohio statutory scheme the trial judge or three-judge panel is the sentencing authority depending on whether or not the defendant waives a trial by jury. It is submitted that this system of judicial sentencing enhances the constitutionality of the Ohio statutory scheme in so far as it should lead to even greater consistency in the imposition of capital punishment due to the experience a trial judge has in sentencing procedures.

Prior to *Furman* v. *Georgia*, supra, the Supreme Court of Ohio held that there was no constitutional provision prohibiting a three-judge court from determining the degree of guilt and sentence without the intervention of a jury, where a jury trial had been voluntarily waived, *State* v. *Ferguson*, 175 Ohio St. 390, 396 (1964), *State* v. *Frohner*, 150 Ohio St. 53 (1948). As was mentioned earlier this Court held that Ohio's pre-*Furman* statutory scheme was constitutional in *McGautha* v. *California*, 402 U.S. 183 (1971). It is submitted that the imposition of sentence by a three-judge panel or trial Court under the present statutory scheme is no different constitutionally than allowing a three-judge panel to impose sentence without the intervention of a jury under the previous statutory scheme.

It is submitted that Petitioner's rights to equal protection under the law and due process were not denied or abridged.

D.

Unlike the statute in *United States* v. *Jackson*, 390 U.S. 570 (1968), the death penalty is possible under the Ohio statute whether the defendant is tried before a jury or a three-judge panel, and it may be avoided under both alternatives.

Petitioner attempts to rest his argument on a "numbers" game. That is, it is easier to convince one of the three-judge panel a mitigating circumstance has been proven than it is to convince only one judge. Obviously, this approach overlooks the possibility that the one judge the Petitioner may have to convince is the same judge who would have heard the case with a jury. For the sake of argument, it is submitted that it may be even easier for the Petitioner to convince one of the twelve jurors that he was not guilty or that he was not guilty of an aggravating circumstance. Without unanimity by the jury the result is either a hung jury or a life sentence.

As in any waiver of a constitutional right there are certain considerations which incline toward exercising the right and other considerations which include toward waiving the right. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel.

Mr. Justice Harlan observed in *McGuatha* v. *California*, supra, that, "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to fol-

low. . . . Although a defendant may have a right even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose", 402 U.S. at 213. The fact that the Petitioner was faced with a difficult judgment as to which course to follow does not make Ohio's statutory scheme unconstitutional.

Furthermore, actual experience in Hamilton County, Ohio, demonstrates that the Ohio Statutory scheme does not coerce a defendant into waiving his constitutional rights. Of the fifteen capital cases tried in Hamilton County, Ohio, at the time the Supreme Court of Ohio reviewed Petitioner's appeal, ten were tried to juries, four were heard by three-judge panels, and one was disposed of by way of a plea. These figures suggest the total absence of any substantial coercion or statutory tilt toward inducing jury waivers. To the contrary, the figures suggest that the balance is on the side of twelve jurors determining the issue of guilt.

E.

It is submitted that defendants facing the death penalty in Ohio have adequate appellate review so as to insure that the penalty is not arbitrarily or capriciously imposed. Defendants have a direct right of appeal to the Court of Appeals and a direct right of appeal to the Supreme Court of Ohio where the lower court of review affirms their death sentence, Rule 4 (B), Ohio Rules of Appellate Procedure and Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution. Thus, the Supreme Court of Ohio, a court with statewide jurisdiction, affords a defendant sentenced to death a full judicial review so as to promote the evenhanded, rational and consistent imposition of the death

sentences under law. *Jurek* v. *Texas*, 428 U.S. 262, 96 S. Ct. 2950, 2958 (1976); *State* v. *Miller*, 49 Ohio St. 2d 198, 204 (1977).

This Court has never mandated a particular form of appellate review in death penalty cases. In *State* v. *Bayless*, 48 Ohio St. 2d 73, 86 (1976), the Supreme Court of Ohio stated that in all capital cases the aggravating and mitigating circumstances would be independently reviewed in each case to insure that capital sentences are fairly imposed by Ohio's trial judges. As the Supreme Court of Ohio observed in *State* v. *Osborne*, 49 Ohio St. 2d 135, 146 (1976), "The Ohio statutes require the death sentence to be imposed upon all defendants convicted of aggravated murder coupled with at least one of seven aggravating circumstances, provided that none of the three mitigating factors exists." Accordingly, all similarly situated defendants are sentenced alike and have their sentences reviewed by a court of statewide jurisdiction.

Contrary to Petitioner's assertion, the Supreme Court of Ohio is not precluded from inquiring into whether findings of fact are correct. In *State* v. *Edwards*, 49 Ohio St. 2d 31, 47 (1976), the Supreme Court of Ohio stated that a determination of whether there is substantial evidence to support the verdict rendered, whether it be the verdict on the criminal charge, aggravating circumstance, or mitigating circumstance, would be made in each capital case. This scope of review is consistent with both the review afforded by the courts in Georgia and Florida which this Court has determined to pass constitutional standards.

The fact that the Supreme Court of Ohio has affirmed all but one capital sentence it has reviewed only indicates that the Ohio statutory scheme has narrowed the scope of the statutes which provide for the death penalty, with

further provisions to focus on the individual nature of the crime and characteristics of the defendant, so that all those upon whom the death penalty is imposed are truly similarly situated.

IV.

WHETHER A CONFESSION IS ADMISSIBLE:

A. WHERE THE ACCUSED IS ADVISED FOUR SEPARATE TIMES OF HIS CONSTITUTIONAL RIGHTS, INCLUDING THE SIGNING OF A WAIVER OF RIGHTS FORM; AND

B. WHERE THE ACCUSED AT NO TIME PLACES THE POLICE ON WARNING THAT HE MISAPPREHENDED HIS RIGHTS; AND

C. WHERE THE ACCUSED IS NOT UNDER THE INFLUENCE OF ALCOHOL OR DRUGS.

Respondent submits that the trial court properly overruled the motion to suppress Petitioner's statement.

Petitioner was arrested at approximately 3:00 p.m. on December 12, 1974. At 6:45 p.m. on the same day Petitioner gave the police a tape recorded statement. Prior to the statement the Petitioner had been advised of his constitutional rights four times. He was advised by the arresting officers, Sefton and Burgess, when he arrived at

the homicide offices. Later he executed a waiver of rights form.

After he was informed by the police what they knew about the case the Petitioner asked to see his brother. Once he had talked to his brother, the Petitioner was left alone in the interrogation room for approximately forty-five minutes.

A third officer, Officer Drescher, saw Petitioner for the first time at approximately 4:30 p.m. He fully advised the Petitioner of his constitutional rights. Petitioner and Officer Drescher talked for a little over an hour before Petitioner agreed to give a taped statement.

Both Officers Burgess and Drescher stated that, in their opinion, the Petitioner was not under the influence of alcohol or drugs. Petitioner had told Officer Burgess that he was not under the influence of alcohol or drugs when asked.

At the outset of the taped statement the Petitioner was again advised of his constitutional rights. Every time his rights were read to him the Petitioner stated he understood them. At no time did he manifest any indication that he misapprehended his rights. Petitioner testified at the motion to suppress that he asked for a lawyer but was allegedly told by Officer Sefton that it was a bad time of day to get a lawyer.

Officer Sefton did not testify at the motion to suppress. Neither Officer Burgess nor Officer Drescher were asked whether Petitioner requested an attorney.

Respondent submits the trial court can believe all, some, or none of the testimony of any witness who testifies at a motion to suppress. The mere fact that Petitioner alleges he requested counsel does not make it a fact. It is more reasonable that Petitioner did ask to consult with someone, and that person was his brother. The record

is clear that Petitioner wanted to know where he stood. He confronted his brother. And he had all the possible charges explained to him.

The initial interrogation resulted in no incriminating statements being made by Petitioner. After a significant interval, during which Petitioner was not questioned, Officer Drescher, who knew Petitioner from past experience, advised the Petitioner of his "Miranda rights". Following an hour or more of conversation, the Petitioner agreed to give a taped statement.

It is submitted that the prosecution met its heavy burden in establishing that the Petitioner voluntarily, knowingly and intelligently gave the police the taped statement. This Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966), does not rule, as Petitioner asserts, that a statement taken in the absence of an attorney must be suppressed *per se*. There is no indication that Petitioner desired an attorney once he talked to Officer Drescher.

Petitioner did testify on his own behalf at trial relating essentially the same matters contained in the tape recorded statement. At no time did Petitioner assert that he was "compelled" to testify due to the admission of the taped recorded weapon. The prosecution had introduced testimony of one of the victims of the attempted robbery who identified the Petitioner as well as testimony from Kenneth Carter, Petitioner's friend, who related that Petitioner had told him Shelton had shot a man while they were pulling a robbery. Petitioner maintained throughout the trial that the shooting was an accident. It is submitted that the prosecution's case, exclusive of the taped statement, was the factor that persuaded the Petitioner to testify. Accordingly, it would be futile for this Court to exclude the taped statement where there is a valid, competent testimonial confession in the record.

CONCLUSION

For the reasons stated above, it is respectfully submitted the Supreme Court of Ohio correctly decided the issues presented by Petitioner. Accordingly, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

SIMON L. LEIS, JR.
Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

ROBERT R. HASTINGS, JR.
Assistant Prosecuting Attorney

THOMAS P. LONGANO
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Attorneys for Respondent

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI [1791]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

OHIO REVISED CODE

E. Complicity. § 2923.03, R.C.

1. Text of § 2923.03, R.C., eff. 1-1-74.

§ 2923.03. (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;

(3) Conspire with another to commit the offense in violation of § 2923.01, R.C.;

(4) Cause an innocent or irresponsible person to commit the offense.

(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.

(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of § 2923.02, R.C.

(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

§ 2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

§ 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which

may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three

judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

APPENDIX B

OPINIONS BELOW

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-75374

STATE OF OHIO,

Plaintiff-Appellee,

vs.

LEROY BATES,

Defendant-Appellant.

DECISION

(Filed June 21, 1976)

Messrs. Simon L. Leis, Jr., Robert R. Hastings, Jr. and Thomas P. Longano, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Albert J. Mestemaker, 2312 Kroger Building, Cincinnati, Ohio 45202, and Michael S. Schwartz, 405 Schwartz Building, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Court of Common Pleas, the transcript of the proceedings, the assignments of error, briefs and oral arguments of counsel.

Shortly after midnight on November 26, 1974, two men entered the Warner Tavern located in Hamilton County. One was defendant-appellant, Bates; the other, a man named Shelton. Shelton was armed with a sawed-off shotgun and both men wore stocking type masks. Three persons were in the bar when the two entered with Lois Wells, the owner of the cafe, situated behind the bar. Robert Schultheis, a patron, occupied a seat at the far end of the bar, and the decedent, Lloyd Adkins, was located near the other end of the bar, in close proximity to the entrance. Appellant preceded Shelton into the bar and walked toward Schultheis becoming involved in an altercation with him. At about the same time, Lloyd Adkins stood and said to Shelton: "Oh no you don't" and grabbed at the shotgun in Shelton's hands. A struggle immediately ensued over possession of the weapon. A single shot was discharged fatally wounding Adkins following which Shelton and the defendant fled from the tavern.

Appellant was subsequently arrested and indicted for aggravated murder, and attempted aggravated robbery. The indictment also contained a specification listed in division (A) of R. C. 2929.04. Appellant plead not guilty but a jury convicted him of both counts of the indictment and, in addition, found him guilty of the specification. He received a term of imprisonment for the attempted aggravated robbery conviction and, after a hearing pursuant to R. C. 2929.03 (D), was sentenced to death for aggravated murder.

Appellant originally urged five assignments of error although ultimately abandoning the third.

The first assignment deals with a motion to suppress inculpatory statements made by appellant to police and recorded for use at trial. After an evidentiary hearing, the motion was overruled and the recorded statement subsequently admitted. Specifically the first assigned error asserts:

> The court erred to the prejudice of defendant-appellant in denying his motion to suppress his statement made to law enforcement officers in violation of his rights guaranteed by the fifth and sixth amendments to the Constitution of the United States of America.

The thrust of this assignment is that, under the circumstances, the appellant could not knowingly and intelligently waive his constitutional (*Miranda*) rights prior to making statements. In support of this contention, it is urged that the evidence shows that appellant possesses below average intelligence and that at the time of the interrogation by police, he was under the influence of alcohol and/or drugs.

The validation of this argument, of course, depends on a resolution of the threshold issue of whether the circumstances alleged by appellant did, in fact, exist. In other words, appellant's theory, in connection with the first assignment of error, assumes a factual conclusion consistent therewith.

Although appellant's evidence at the suppression hearing supports his factual assertions, other and contradictory evidence, offered by the state, if accepted by the trier of facts, would require a contrary conclusion. Thus, a question of credibility exists and also a weight of the evidence issue. As noted above, there was competent evidence which

tended to show that appellant was not under the influence of alcohol or any drug, and low intelligence by itself does not rule out a knowing and voluntary waiver. For example, one police officer testified as follows:

> Q. Based on your experience as a police officer and the description you have given of this Defendant on the day he was arrested, do you have an opinion as to this man's sobriety at the time you arrested him?
>
> MR. MESTEMAKER: Object.
>
> THE COURT: Overruled.
>
> A. In my opinion he was sober and not under the influence of any drug that I could determine on a visual contact.
>
> Motion to suppress, (T. p. 167)

Appellant has failed to demonstrate any error regarding the overruling of the motion to suppress. The first assignment of error, therefore, is overruled.

The second assignment asserts that:

> The trial court erred to the prejudice of defendant-appellant when it overruled his objection to the receipt in evidence of state's exhibits seventeen and eighteen.

State's exhibits seventeen and eighteen are two cardboard targets used to conduct certain tests by police officers for the purpose of establishing the distance between the shotgun barrel and the victim Adkins. This question of distance was relevant to the issue of whether the shooting was purposeful or accidental. The state's witness referred to the exhibits in offering his opinion that the fatal shot was fired at the decedent from approximately four to five feet away, a conclusion tending to negate appellant's po-

sition that the shotgun was fired accidently in the course of a physical struggle over its possession.

The basis for the objection to the exhibits below and the challenge to their admission at the appellate level is that there was no showing that firing the shotgun at exhibits 17 and 18 recreated a condition substantially similar to the conditions existing at the time of the homocide. More specifically, appellant contends that the cardboard targets provided a different amount of resistance to the shotgun blasts than did Adkin's body because Adkins wore a number of items of clothing and had a pack of cigarettes in his breast pocket.[1]

There was no proof below that use of the cardboard did, in fact, create substantially different conditions than those existing at the scene of the homicide. And, as stated in 21 C Jur 2d, EVIDENCE, § 522, pg. 546, ". . . the question of admissibility as affected by dissimilarity of conditions is essentially a matter within the discretion of the trial court."

We find no abuse of discretion in the trial court's ruling on this matter. What weight to grant the evidence, of course, rested with the jury.

The second assignment is overruled.

The fourth alleged error claims that:

> The trial court erred to the prejudice of defendant-appellant when he refused to give the standard instructions on accident to the jury.

---

[1] A reading of the record reveals that the obvious purpose for which the gun experiments were conducted, and the exhibits with reference threto introduced, was to demonstrate the *spread*, not penetration of the shotgun pellets. Evidence of the extent of spread was offered in proof of distance between weapon and victim. With this purpose in mind, any arguable differences between the experiments and the actual conditions as they existed when Adkins was shot, with respect to his clothing and the cigaret package, would be irrelevant to the question of the admissibility of exhibits seventeen and eighteen.

We believe the trial court did *not* err in refusing the requested "standard" instruction on accident for at least two reasons. (We emphasize parenthetically that counsel used the precise description "standard" instruction in seeking additional language about the concept of accident.)

One of the essential elements of the crime of aggravated murder, requiring proof beyond a reasonable doubt, is a *purposeful* killing. Appellant contended the shooting was an accident. In this connection the court included the following language in its instructions:

> Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and *not accidentally*. (Emphasis added.) T. p. 353.

Thus, the judge gave an accurate charge which included the possibility of a finding by the jury of accident thus barring a conviction of aggravated murder. The word "accident" (or "accidently") is a term of common use in the English language and readily understandable. It is not a technical term. The court was not required to amplify or explain it any further. See 53 O Jur 2d, TRIAL § 171, pg. 32. Since the court did charge on purpose, an additional charge on accident would have proven redundant.

Secondly, the specific instruction requested by counsel is not sufficiently apposite to the facts here.[2] It is mani-

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[2] It is uncontroverted that this is the instruction which appellant wanted included in the charge to the jury and which the court rejected:

411.01 Accident (standard instruction) (NEW)

a. The defendant denies any purpose to bring about the result of . . . He denies that he committed an unlawful act and says that the result was accidental.

b. DEFINED. An accidental result is one that occurs unintentionally and without any purpose to bring it about. An accident is a mere physical happening or event, out of the usual order

fest that such instruction states that an accident is a valid defense. Although proof of an accident would preclude a conviction for aggravated murder, it would not prevent a conviction for involuntary manslaughter, under R. C. 2903.04 (A), which provides:

> (A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.

Accident obviously is not a defense to this crime and to provide the jury with such an instruction on accident, under these facts, could confuse, mislead or misguide the jury. The court has the duty, of course, to avoid such misdirection. See 53 O Jur 2d, TRIAL, § 174, pg. 38.

For these reasons, the fourth assignment of error is overruled.

The final assignment, the fifth, claims error resulted from the hearing held to determine the degree of punishment following the conviction of Bates for aggravated murder. R. C. 2929.04 (B) provides for such a hearing to test for the existence of any of three specified mitigating circumstances any one of which blocks imposition of the death penalty.

The three mitigating circumstances follow:

> (1) The victim of the offense induced or facilitated it.

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of things and not reasonable (anticipated) (foreseen) as a natural or probable result of a lawful act.

c. FORESEEABILITY. 4 OJI Criminal 409.56

d. CONCLUSION ON ACCIDENT. If after considering all the evidence, including that on the subject of accident, you are not convinced beyond a reasonable doubt that the defendant had a purpose to bring about the . . ., you must return a verdict of not guilty.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

The court erred, it is charged in the fifth assignment, by not finding one or more of the above listed mitigating circumstances. Although appellant urges the aptness of all three of the above sentence qualifiers, his argument concentrates on the first, that is, upon the failure of the court to conclude that the victim induced or facilitated his own death. The challenge in the fifth assignment, especially the portion thereof directed to number one above, propounds a thorny issue. What precisely did the legislature contemplate in its enactment of R. C. 2929.04 (B) (1) supra? It seems to us in analyzing number one above that it would torture excessively any fair concept of reasonableness to interpret that portion of the enactment to mean that any movement, any gesture, any verbal expression or any demeanor whatsoever indicating a victim's disapproval or resentment amounts to inducement or facilitation of a killing. We believe the legislature intended something more than occurred here before it could be held that a victim induced or facilitated his own death. Of course, whether there has been inducement or facilitation must be a case by case evaluation, but we are unable to view R. C. 2929.04 (B) (1) as barring the death penalty for all natural reactions to dangerous confrontations.

Assume, arguendo, the presence of some elements of inducement or facilitation by the victim in the matter sub judice. By the time Shelton discharged the lethal shot, the short-lived scuffle between him and the victim had

terminated; moreover, there was probative evidence that Shelton was four to five feet removed from Adkins (the victim) when Shelton shot him, thus constituting an arguably separate transaction apart from the earlier struggle.

The appellant had the burden below to establish by a preponderance the existence of the mitigating circumstance vis-a-vis inducement on facilitation. He failed to do so at the sentencing hearing. Moreover, at this appellate level, the appellant has the substantial obligation to demonstrate, if he is to prevail, any error claimed to have occurred at the trial level. See 3 O Jur 2d, APPELLATE REVIEW, § 716, p. 670, where it is documented that:

> From what has been said, it follows that error will not be presumed, but must be made to appear affirmatively on the record, or, as it (sic) sometimes stated, the burden is upon the appellant to show that error has occurred.

The fifth assignment, as it relates to the other two mitigating sets of circumstances, in effect asserts a court failure to find the existence thereof amounting to a result contrary to the manifest weight of the evidence. Examination of the record reveals justification for the trial court's rejection of the two other possible mitigating circumstances.

This final assignment, lacking merit, must be overruled.

We affirm.

SHANNON, P. J., PALMER and KEEFE, J. J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

CASE NO. C-75374

STATE OF OHIO,

Plaintiff-Appellee,

vs.

LEROY BATES,

Defendant-Appellant.

ENTRY SUSPENDING EXECUTION OF SENTENCE

(Filed July 22, 1976)

On motion of the defendant-appellant, Leroy Bates, and on notice duly given to the Prosecuting Attorney of Hamilton County, Ohio, and for good cause shown, it is ordered by a majority of the Judges of this court that the execution of the sentence of death in the electric chair to be carried out on the 18th day of November, 1976, be, and the same is hereby suspended pending the perfection and disposition of an appeal of right filed on behalf of said defendant-appellant in the Supreme Court of Ohio.

Further, it is the order of this court that a certified copy of this entry suspending the execution of sentence

of death imposed upon Leroy Bates be forwarded by Certified Mail to Arnold R. Jago, Director of the Southern Ohio Correctional Facility, the party in whose custody the person of Leroy Bates has been charged, directing him to suspend the imposition of the sentence of death heretofore imposed upon said Leroy Bates until further order of the court having jurisdiction over said Leroy Bates.

RAYMOND E. SHANNON
Presiding Judge

JOHN W. KEEFE, Judge

GEORGE H. PALMER, Judge

/s/ ALBERT J. MESTEMAKER
/s/ MICHAEL S. SCHWARTZ

COUNSEL FOR DEFENDANT-APPELLANT

SUPREME COURT OF OHIO

THE STATE OF OHIO,

Appellee,

v.

BATES,

Appellant.

[Cite as State v. Bates (1976), 48 Ohio St. 2d 315.]

Criminal law — Aggravated murder — Sentence — Mitigation inquiry — R.C. 2929.04(B) — Evidence — Statements made to police officers — Cardboard test targets — Admissibility — Charge to jury.

(No. 76-904 — Decided December 23, 1976.)

APPEAL from the Court of Appeals for Hamilton County.

On January 24, 1975, the Hamilton County grand jury returned a two-count indictment, with a specification. The first count charged Leroy Bates and Ellis Shelton with purposely causing the death of Lloyd Adkins while attempting to commit aggravated robbery in violation of R. C. 2903.01.

The specification to the first count stated that the offense contained in the first count was committed while Bates and Shelton were attempting to commit aggravated robbery.

The second count charged the pair with attempted aggravated robbery, as defined by R. C. 2911.01 and in violation of R. C. 2923.02.

In a separate trial, Bates was found guilty on each count and the specification. Following a psychiatric examination

and a presentence probation report, a mitigation hearing was conducted. The court found an absence of any mitigating factors, and, on July 1, 1975, Bates was sentenced to death on the first count and the specification thereto. On the second count, he received a sentence for a term of years.

The Court of Appeals affirmed the conviction and sentence.

The cause is now before this court upon an appeal as of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Robert R. Hastings, Jr.* and *Mr. Thomas P. Longano*, for appellee.

Latimer & Swing Co., L. P. A., Mr. Albert J. Mestemaker, Messrs. Schwartz & Schwartz and *Mr. Michael S. Schwartz*, for appellant.

Per Curiam.

I.

The record before us establishes the following facts:

On November 25, 1974, the defendant-appellant, Leroy Bates, was living at his sister's residence located at 2248 Wheeler Street, in Cincinnati. Ellis Shelton, a friend of Leroy Bates for about six years, stopped by the Wheeler Street address to see Bates that afternoon.

Shelton explained to Bates that he was planning an armed robbery of the Warner Tavern and that it would be necessary for him to have a gun. Shelton also informed Bates that when he pulled the robbery off he would have the gun with him; that he would have ammunition for the gun; and that it would be loaded.

Shelton asked Bates if he knew of anyone who had a gun and, if so, could he obtain it. Bates told Shelton that he knew of an individual who had guns and that he could

get a gun for Shelton. He then telephoned a friend by the name of Kenneth Carter. From past experience he knew that Carter had access to firearms. Bates asked Carter to loan him a gun, but Carter refused and said that he was willing to sell him one for $20. Bates agreed to this purchase price.

During their discussion, Shelton told Bates that he would need help and assistance in executing the robbery. When asked if he would assist Shelton in the robbery, Bates agreed.

Later that day, in the early evening, Kenneth Carter arrived at the Wheeler Street address carrying a sawed-off, 12-gauge shotgun. Shelton met Carter on the street in front of Bates' sister's home where Carter handed the gun to Shelton, who, in turn, handed $13 to Carter. The balance of $7 was to be paid to Carter at a later time. Shelton was also given three or four shotgun shells with number 5 or 6 size shot.

Shelton departed after the transaction with Carter and subsequently returned in the late evening hours of the same day. Shelton and Bates then left the Wheeler Street address together and headed for a wooded hillside known as "TV Hill," located in the Wheeler Street area, the property of WCET television studios.

When the two men arrived at the hill, Shelton removed the unassembled shotgun from a bag. The weapon, in three pieces, was then assembled by Shelton. Appellant observed Shelton assembling the weapon and also saw that Shelton was in possession of several shotgun shells for the weapon. Both men then put stocking masks over their heads before they proceeded to the bar. Bates' role in the robbery was to go behind the bar and take the money while Shelton held the shotgun on the patrons. The expected take in the robbery was to be about $200.

They departed "TV Hill" together, headed for the Warner Tavern located at 303 Warner Street. Upon their arrival both men looked into the tavern and observed three people sitting in the bar.

Bates and Shelton then entered the tavern with the former leading the way. The time was approximately midnight or shortly thereafter. Lois Wells was tending bar and standing next to the cash register. Robert Schultheis was seated at the bar located in the rear part of the barroom. Lloyd Adkins, an off-duty Pinkerton guard, was seated at the bar next to the front entrance. Adkins and Schultheis were approximately 15 to 18 feet apart.

Lois Wells asked the masked men what they wanted. Shelton remained by the front door and Bates moved to the rear area of the bar. The opening to the rear of the bar was located next to where Schultheis was sitting. After Lois Wells inquired as to the nature of their business, Shelton raised the shotgun over the bar aiming directly at her. Wells then stated, "All right, I know what you want."

When Bates started to move around to her side of the bar, it was Wells' intention to let him take the money. As Lois Wells moved to the rear of the bar, she heard Adkins say to Shelton, "Oh, no you don't!" She then turned and looked toward the front of the tavern, where Shelton and Adkins were struggling. Wells heard Shelton shout at Adkins to get back or he would be killed. Wells then observed Shelton push Adkins off balance. Shelton then stepped back and fired the fatal shot directly at Adkins from a distance of several feet.

Meanwhile, Bates engaged Schultheis in a fight and struck him. As a result, Schultheis was knocked to the floor and kicked by Bates. Schultheis then managed to get

off the floor and move to a back room and hide $280 that he had on his person.

Lois Wells identified Bates, at the trial, as the man who entered the tavern first and subsequently struck Schultheis.

After the shooting, Bates and Shelton fled the tavern on foot. They went back to "TV Hill" and stripped the stocking masks from their heads and threw them away. The shotgun was then disassembled, and the two returned to 2248 Wheeler Street.

At approximately 1:30 a. m., on November 26, 1974, Kenneth Carter received a telephone call from Bates asking Carter to pick up the shotgun that Shelton had used to murder Adkins. Carter did not reclaim the gun as the appellant had requested.

Carter saw the appellant, at approximately 2:00 p. m., on November 26, 1974, and appellant again told Carter of the events of the preceding evening, including the shooting.

Carter testified at trial that the gun was capable of firing. He also testified that the weapon had to be cocked before it could be fired. The shotgun was identified at trial.

Bates hid the gun in the backyard of his sister's residence and kept it there for about two days. Then he took the gun, wrapped in a towel and secured with a string, to a wooded area in Mt. Airy Forest near Kirby Road where he threw the shotgun away.

On December 12, 1974, Bates was placed under arrest. He was repeatedly advised of his constitutional rights and signed a waiver of his rights. The appellant then freely told police of his involvement in the robbery attempt and murder which occurred at the Warner Tavern.

The coroner testified that the cause of death was hemorrhage as a result of a gunshot wound of the chest.

II.

Appellant advances four propositions of law, the first of which asserts that:

"The court erred to the prejudice of defendant-appellant in denying his motion to suppress his statement made to law enforcement officers in violation of his rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States of America."

The record indicates that Bates was arrested at his sister's home at about 3:00 p. m. on December 12, 1974, and apprised of what the police wished to talk to him about. According to Officer Burgess' testimony, his speech was clear and his appearance normal, and he was neither drunk nor under the influence of drugs. They arrived at the homicide squad office at approximately 3:30 p. m. At that time, Officer Sefton advised him orally of his constitutional rights in an interrogation room. Next, defendant was informed that his brother, Frank, and Kenneth Carter had told police about his involvement in the attempted robbery and killing. He spoke to his brother, who was brought to the interrogation room, and the latter denied saying anything to the police.

Officer Drescher then talked to the appellant after first advising him of his constitutional rights. They talked for an hour. Drescher testified that, based on the fact that he had talked to the appellant for over an hour and upon his prior police experience with persons under the influence of alcohol or drugs, it was his opinion that Bates was not under the influence of an alcoholic beverage or a drug.

After talking with Drescher for an hour, Bates signed a standard police notification of rights form, which waiver set out his constitutional rights, and then gave Drescher

a recorded statement. At the outset of the recorded statement, Bates was again advised that:

(1) He had the right to remain silent;

(2) anything he said could be used against him in court;

(3) he had the right to talk to counsel before any questioning;

(4) he had a right to have an attorney with him when he answered questions;

(5) if he could not afford an attorney, one would be appointed for him; and

(6) if he started to answer questions, he still had the right to stop answering questions at any time.

In the course of the interrogation, Officer Burgess asked specifically whether Bates had been drinking or was under the influence of any drugs, and he stated he was not.

Thus, the record discloses beyond peradventure that the appellant knowingly, voluntarily and intelligently waived his constitutional rights. There is nothing in the record to indicate that Bates misapprehended his rights as was the case in *State* v. *Jones* (1974), 37 Ohio St. 2d 21, and *State* v. *Parker* (1975), 44 Ohio St. 2d 172. He was advised of his rights three times; Once by Officer Sefton; once by Officer Drescher; and once in the waiver of rights form at the outset of the recorded statement. He signed the waiver of rights form.

It must also be noted that the state produced an eyewitness, Lois Wells, who identified Bates as one of the two men who attempted to commit aggravated robbery at the Warner Tavern on November 26, 1974, shortly after midnight.

Bates testified in his own behalf and related to the jury essentially the same story he related in the recorded state-

ment. It is not urged by appellant that the introduction of the recorded statement required him to take the witness stand. Thus, he was not compelled to waive his constitutional right against self-incrimination.

For these reasons, in our judgment, the trial court did not err in overruling appellant's motion to suppress his recorded statement, and his proposition of law No. 1 is rejected.

III.

For his second proposition of law, appellant claims that:

"The trial court erred to the prejudice of defendant-appellant when it overruled his objection to the receipt in evidence of state's exhibits seventeen and eighteen."

State's exhibit Nos. 17 and 18 are two cardboard targets used to conduct certain tests by police officers for the purpose of establishing the distance between the shotgun barrel and the victim, Adkins. This question of distance was relevant to the issue of whether the shooting was purposeful or accidental. The state's witness referred to the exhibits in offering his opinion that the fatal shot was fired at the decedent from approximately four to five feet away, a conclusion tending to negate appellant's position that the shotgun was fired accidently in the course of a physical struggle over its possession.

The basis for the objection to the exhibits below and the challenge to their admission at the appellate level is that there was no showing that firing the shotgun at exhibit Nos. 17 and 18 recreated a condition substantially similar to the conditions existing at the time of the homicide. More specifically, appellant contends that the cardboard targets provided a different amount of resistance to the shotgun blasts than did Adkins' body, because Adkins

wore of [sic] number of items of clothing and had a pack of cigarettes in his breast pocket.

A reading of the record reveals that the obvious purpose for which the gun experiments were conducted, and the exhibits with reference thereto introduced, was to demonstrate the *spread*, not penetration of the shotgun pellets. Evidence of the extent of spread was offered in proof of distance between weapon and victim. With this purpose in mind, any arguable differences between the experiments and the actual conditions as they existed when Adkins was shot, with respect to his clothing and the cigarette package, would be irrelevant to the question of the admissibility of exhibit Nos. 17 and 18.

There was no evidence at the trial that the use of the cardboard did, in fact, create substantially different conditions than those existing at the scene of the homicide. As stated in 21 Ohio Jurisprudence 2d 546, Evidence, Section 522, "* * * the question of admissibility as affected by dissimilarity of conditions is essentially a matter within the discretion of the trial court."

We find no abuse of discretion in the trial court's ruling on this matter. What weight to grant the evidence, of course, rested with the jury. Proposition of law No. 2 is not accepted.

IV.

Appellant contends in his third proposition of law that:

"The trial court erred to the prejudice of defendant-appellant when it refused to give the standard instruction on accident to the jury."

The record demonstrates the jury was instructed that before it could find Bates guilty of aggravated murder while attempting to commit aggravated robbery, it had to

find, among other things, that the killing of Lloyd Adkins was done purposely.

The trial court also instructed the jury as follows:

"Purpose to kill is an essential element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to kill. A person acts purposely when the gist of the offense is a prohibition against conduct of a certain nature regardless of what the offender intends to accomplish; thereby it is his specific intention to engage in conduct of that nature. Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. *To do an act purposely is to do it intentionally and not accidentally.* Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct. The purpose with which a person does an act is determined by the manner in which it was done, the means or weapon used, and all the other facts and circumstances in evidence. If a wonnd [*sic*] is inflicted by a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill may be inferred from the use of the weapon." (Emphasis added.)

The court also instructed the jury on lesser included offenses of manslaughter and involuntary manslaughter:

"The crime of manslaughter is distinguished from aggravated murder by the absence or failure to prove purpose to kill."

As pointed out by the Court of Appeals in its opinion, the trial judge gave an impeccable charge which included

the possibility of a finding by the jury of accident, thereby barring a conviction of aggravated murder.

The charge as given was correct; appellant's proposition of law is incorrect and is not accepted.

V.

It is urged in appellant's fourth proposition of law that:

"The trial court erred as a matter of law when it failed to find the existence of one or more mitigating circumstances on behalf of defendant-appellant relative to the penalty to be imposed for the offense of aggravated murder."

R. C. 2929.03 (E) provides that:

"Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender."

The mitigation hearing in this cause was heard on the 30th day of June, 1975, before Judge William S. Mathews, Court of Common Pleas of Hamilton County, Ohio. The report of Dr. Hamilton was stipulated as was the report of Dr. McDevitt and Dr. Weaver, except for the final two paragraphs of the latter report. In addition, the probation report was stipulated. The appellant and his mother also testified at the mitigation hearing.

At the conclusion of the hearing, the court ruled that the evidence failed to show by a preponderance that:

(1) The victim of the offense induced or facilitated it;

(2) it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; or

(3) the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

In the face of the record, this ruling of the trial court and its affirmance by the Court of Appeals is totally justified.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,

Appellee,

v.

HALL,

Appellant.

[Cite as State v. Hall (1976), 48 Ohio St. 2d 325.]

Criminal law — Aggravated murder — Imposition of death penalty — Constitutionality — Discovery — Crim. R. 16 (B) — Duty of prosecutor — "Statement of defendant," construed.

1. Ohio's statutory framework for the imposition of capital punishment is a valid constitutional enactment of law and does not violate the Constitution of the United States or of the state of Ohio. (*State* v. *Bayless*, 48 Ohio St. 2d 73, approved and followed.)

2. Where a motion for discovery under Crim. R. 16 (B) is granted by a trial court, the prosecuting attorney shall permit a defendant to inspect and copy all relevant written or recorded statements made by the defendant or codefendant.

3. A written waiver of *Miranda* constitutional rights form signed by the defendant is a statement within the meaning of Crim. R. 16 (B).

(No. 76-609 — Decided December 23, 1976.)

APPEAL from the Court of Appeals for Hamilton County.

On October 16, 1974, at about 10:00 p.m., Mr. and Mrs. Julius Graber returned to their Park Lane Apartment in Cincinnati from an evening of entertainment at the Music Hall. Mr. Graber drove his 1974 Chevelle Malibu to the front of the apartment building, whereupon Mrs. Graber alighted at the door and entered the building, and proceeded up to their apartment. Graber was last seen driving his automobile down toward the parking garage. About 15 minutes later, Mrs. Graber came back down from her apartment concerned about her husband's whereabouts. The doorman after conversing with her, proceeded to search the parking garage and a lot nearby. Finding neither Graber nor his vehicle, the doorman reported the same to Mrs. Graber who called the Cincinnati Police Department. An officer was dispatched arriving at the apartment at about 10:50 p. m., and after a discussion with Mrs. Graber, initiated a police broadcast for Julius Graber as a missing person.

After Graber dropped his wife off, he pulled his car into the parking garage and proceeded to his allotted space. As he pulled in, a car containing Sam Hall (appellant herein), and Willie Lee Bell stopped behind him preventing him from backing up. Hall got out of this vehicle with a .20 gauge sawed-off shotgun and approached Graber. He then ordered Graber into the trunk of his Chevelle automobile, entered the vehicle and proceeded to drive it out of the garage, Bell following in the other car. They drove to a street adjoining Hall's residence where Bell parked the other car and got behind the wheel of the Graber automobile. As they approached the Spring Grove Cemetery in the Winton Terrace area of Cincinnati, Hall directed Bell to drive into a gravelled surface lane. Bell backed the vehicle about 100 feet into this lane and stopped.

It was now approximately 10:45 p. m., and a Mr. Robert

Pierce, Jr., residing in an apartment building across the street from the cemetery, arrived home from work and parked his vehicle in the front lot. His car radio was broadcasting a World Series game, and as he waited for the inning to end, he noticed the Graber vehicle with its parking lights on in the cemetery lane. He heard the sound of car doors close and turned off his radio. He turned around toward the cemetery and heard someone plead, "Don't shoot me, Don't shoot me." He then heard a shot and after a short interval, another shot. Shortly thereafter, the car drove out of the lane and after getting on Groesbeck Road, turned on its lights. Pierce called the police who responded at about 11:04 p. m., and after telling them what he had heard, they went into the cemetery. About 200 feet back, they found Graber lying with the right side of his face in a pool of blood, his right arm at his side and his left arm cocked up by his head. They immediately determined he was alive and called for the Rescue Life Squad. The ambulance took Graber to the emergency room at General Hospital where he was pronounced dead.

The body was subsequently examined by the county coroner who attributed the cause of death to "lacerations of the brain, causing hemorrhage, due to multiple shotgun wound." A part of his left hand was also shot away, indicating that his hands were crossed behind his head at the time he was executed. Over 70 shotgun pellets were recovered from Graber's head.

Shortly after 9:00 a. m., on the next morning, October 17, 1974, a 1974 Chevelle Malibu pulled into a gas station in Dayton. Two men, Hall and Bell, were in the automobile. They inquired about road work from the attendant and left. Within 15 minutes, they returned, Hall alighting from the vehicle with a sawed-off shotgun. The attendant was ordered into the trunk of his own car, where

he was relieved of the station's money. After filling the gas tank of the attendant's car, they left the station with Hall driving the attendant's car and Bell following in Graber's vehicle.

A State Highway Patrolman stopped the attendant's vehicle for a defective exhaust. Hall, immediately upon stopping, got out of the car and walked toward the patrol car announcing that there was a shotgun on the front seat of which he knew nothing. The station attendant saw the patrolman through a hole in the trunk and began pounding on the trunk. The patrolman, after getting him out of the trunk, took Hall to the Montgomery County Jail. Bell in the Chevelle returned to Cincinnati, hiding the car in a vacant building. A citizen spotted the car and reported it to the police. After being impounded, the car was dusted for fingerprints whereupon Hall's fingerprint was lifted from the passenger door.

A shotgun shell was recovered near the spot where Graber's body was found and compared with shells test fired from the shotgun taken from Hall in Dayton. An expert testified that all the shells were fired from the same gun.

While Hall was held in Dayton, he made two statements to Cincinnati police officers and one statement to a Columbus detective.

On November 22, 1974, Hall was indicted by the Hamilton County Grand Jury on two counts of aggravated murder with specifications, on one count of aggravated robbery, and on one count of kidnapping. At his arraignment he entered a plea of not guilty and counsel were appointed to represent him. Counsel immediately filed a demand for discovery pursuant to Crim. R. 16 (A), and entered an additional plea of not guilty by reason of insanity. Thereupon, the court appointed three psychiatrists to inquire

into the question of Hall's sanity. The psychiatrists reported their findings accordingly. On January 13, 1975, the court found him sane and capable of standing trial. On January 14, 1975, Hall waived in writing his right to a jury trial and elected to be tried by a three-judge panel.

On January 15, 1975, Hall appeared with his counsel before a three-judge panel for trial, at which time his counsel withdrew his previously entered plea of not guilty by reason of insanity and the cause proceeded to trial. The appellant, Hall, while taking the stand on *voir dire* pursuant to a motion to suppress, did not testify at the trial.

On January 20, 1975, Hall was found guilty of the second count of aggravated murder with the specification of committing the crime while kidnapping, and of the third and fourth counts of the indictment.

A presentence examination was ordered, as was an examination by two psychiatrists pursuant to R. C. 2929.04 (B).

On March 7, 1975, a mitigation hearing was held before the same panel which unanimously concluded that there were not mitigating circumstances and sentenced Hall to die on August 20, 1975, on the charge of aggravated murder and to terms of years on the other charges.

Appeal was taken to the Court of Appeals, and that court affirmed the trial court's judgment.

The cause is now before this court as a matter of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, and *Mr. Robert R. Hastings, Jr.*, and *Mr. Bruce Garry*, for appellee.

Mr. Clayton E. Shea, for appellant.

CELEBREZZE, J. At the outset, we can dispose of the appellant's contention that the imposition of the death penalty violates the Eighth and Fourteenth Amendments to the Constitution of the United States, in a succinct man-

ner. Suffice to say, that this argument has been previously resolved by this court in the case of *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, and that ruling has been adhered to on a number of occasions. We have carefully examined both the record in this case and the brief in support of appellant's proposition of law characterizing this complaint and we are constrained to say that we find nothing novel therein. Therefore, we shall not consider this argument further.

The appellant then contends that his statements admitted by the trial court should have been suppressed since the state did not meet its burden of establishing that he knowingly, intelligently, and voluntarily waived his *Miranda* rights. Appellant complains further that the statements were inadmissible for the reason that the prosecution did not furnish the defense with a copy of the waiver of these rights pursuant to their motion for discovery under the Rules of Criminal Procedure.

With respect to the latter contention, the record discloses that the appellant was interviewed on three separate occasions while in custody in Dayton. The first two interviews took place on October 22, 1974, and October 23, 1974, and were conducted by detectives from the Cincinnati Police Department. On October 28, 1974, a detective from the Columbus Police Department interviewed the appellant. Pursuant to the motion for discovery filed by appellant, the prosecutor furnished defense counsel with copies of the "waiver of rights" forms executed by the appellant pertaining to the first two sessions. For whatever reasons — the prosecutor says he did not know the Columbus Police had a "waiver of rights" form for their interrogation — the prosecutor did not comply with the court's order to furnish the third waiver. The appellant maintains that without this written waiver the third state-

ment should not have been admissible. We will not decide here the former contention, but it is obviously not a complete statement of the law.

The first two statements were tape-recorder, the former denying everything and the latter admitting participation in the kidnapping and robbery but not in the homicide. It is the third statement which the appellant characterizes as "crucial" because in this verbal statement the appellant admits his participation in the killing.

Crim. R. 16 (B) (1) (a) (i) allows discovery of statements of the defendant or co-defendant, as follows:

"(a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any of the following which are available to, or within the possession, custody, or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:

"(i) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof * * *."

Appellant contends that the signed waiver form was evidence of a voluntary, knowing and intelligent waiver and since it was not furnished pursuant to the allowance of the discovery motion, it should have been excluded by the trial court under Crim. R. 16 (E) (3):

"If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances."

This exclusion, contends appellant, would have been sufficient grounds for the court to refuse the statement.

Appellee argues that the trial court properly admitted the waiver form because it could not be categorized as "information subject to disclosure." Moreover, appellee states, even if the written waiver was not subject to disclosure, it was properly received because the prosecutor did not have knowledge of its existence until just prior to the time the Columbus detective took the witness stand. Thus, the trial court in the exercise of its discretion could admit such a waiver form. Appellee states further that the appellant was not prejudiced by the admission of this document since defense counsel had already been provided with the other two waiver forms, apparently concluding that since it had complied with two-thirds of the court's order that was sufficient.

The Court of Appeals held that the form was not a "statement of defendant" under Crim. R. 16 (B) (1) (a), but arguably might be a "paper" under sub-paragraph (c) which reads:

"Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belonged to the defendant."

That court apparently accepted the prosecutor's argument that since he had no knowledge of the existence of the "paper," it was not "available to or within the possession, custody, or control of the state * * *."

We conclude that the signed waiver form constituted a "statement of defendant" within the meaning of Crim. R. 16 (B) (1) (a). Although it defies belief that an otherwise competent prosecutor would not be aware of a key document in the custody of an important state's witness, we are prepared to accept the confidence of the trial court in accepting this explanation. It should be noted, however, that the moment the prosecutor became aware of the waiver form he had a continuing duty to disclose such matter to the other party. (Crim. R. 16[D].)

The question to be determined is: "Did the trial court abuse its discretion and commit prejudicial error in admitting the waiver?" The record discloses that defense counsel had already secured two waiver forms and was on notice so as to be prepared to examine the police officers regarding their execution.

Finally, as indicated above, the interrogating officer was capable of testifying to the circumstances surrounding the obtaining of the waiver even if the document itself had been excluded. We conclude that given the totality of the circumstances, the action of the trial court, at most, constituted harmless error. (See *Chapman* v. *California* [1967], 386 U.S. 18.)

Finally, appellant contends that the state did not satisfy its burden of proving that he knowingly, intelligently and voluntarily waived his Fifth Amendment right against self-incrimination. The record discloses two incriminating statements, the one given on October 23, 1974, in which he admitted participating in the kidnapping and robbery and the other on October 28, 1974, where he confessed to participating in the murder.

The United States Supreme Court has held in the case of *Miranda* v. *Arizona* (1966), 384 U.S. 436, that the prosecution must allege and prove the following before a

statement made by an accused during a custodial interrogation may be admitted in evidence:

(1) That the accused, prior to any interrogation, was given the *Miranda* warnings;

(2) After receiving said warnings, that the accused made "an express statement" that he intended to waive his rights; and

(3) That the accused effected a voluntary, knowing and intelligent waiver of his rights.

The burden is on the prosecution to prove a valid waiver under the above conditions. (*State* v. *Kassow* [1971], 28 Ohio St. 2d 141.)

Appellant contends that the totality of the circumstances indicate the waiver was not voluntary, knowing or intelligent, because he did not have the intelligence to validly waive his rights. It is the appellant's position that he did not possess the intellectual ability to comprehend the meaning and significance of the five initial warnings given him or the mental acuity and capacity to competently decide whether to waive his rights. The facts in the record do not support this conclusion. The transcript indicates that prior to each interview by the police, the appellant was fully advised of his constitutional rights. In addition, upon all these occasions the appellant signed a "waiver of rights" form which was shown and read to him before signing. The appellant stated that he could read and each time he was read his rights he responded that he understood them. The record discloses that the appellant responded appropriately to the questions and he appeared to be calm and intelligent. According to the testimony, at no time did the appellant manifest any conduct which could be construed as a misapprehension of his rights. (*State* v. *Jones* [1974], 37 Ohio St. 2d 21.)

The record does not substantiate the appellant's contention that he did not possess sufficient mental capacity to know and understand the explanations given to him or that having understood them he did not voluntarily and knowingly waive them.

The judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, W. BROWN and P. BROWN, JJ., concur.

APPENDIX C

APPELLATE RULES

RULE 4. Appeal as of right — when taken

* * *

(B) Appeals in criminal cases. In a criminal case the notice of appeal by a defendant shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty days after the entry of an order denying the motion. A motion for a new trial on the ground of newly discovered evidence, made after expiration of the time for filing a motion for new trial on other grounds, will not extend the time for appeal from a judgment of conviction. In an appeal by the prosecution, the notice of appeal shall be filed in the trial court within thirty days of the date of the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

RULE 5. Appeals by leave of court in criminal cases

(A) Motion and notice of appeal. After the expiration of the thirty day period provided by Rule 4 (B) for the

filing of a notice of appeal as of right in criminal cases, an appeal may be taken only by leave of the court to which the appeal is taken. In such event, a motion for leave shall be filed with the court of appeals setting forth the reasons for the failure of the appellant to perfect an appeal as of right and setting forth the errors which the movant claims to have occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by such parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by Rule 3 and file a copy of the notice of appeal in the court of appeals. The movant shall also furnish a copy of his motion and a copy of the notice of appeal to the clerk of the court of appeals who thereupon shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the prosecution, who may, within thirty days from the filing of the motion, file such affidavits, parts of the record and brief or memorandum of law to refute the claims of the movant.

(B) Determination of the motion. Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

(C) Order and procedure following determination. Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who thereupon shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. In the event that the motion

for leave to appeal is overruled the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. In the event that the motion is sustained and leave to appeal is granted the further procedure shall be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.

RULE 12. Determination and judgment on appeal

(A) Determination. In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision.

CONSTITUTION OF THE STATE OF OHIO
Art. IV, § 2

§ 2. Supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended by 132 v HR 42, eff. 5-7-68; 120 v 743)

APPENDIX D

ISSUES RAISED BELOW

OHIO SUPREME COURT

No. 76-904

PROPOSITIONS OF LAW

Proposition of Law No. 1

The Court erred to the prejudice of Defendant-Appellant in denying his motion to suppress his statement made to law enforcement officers in violation of his rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States of America.

Proposition of Law No. 2

The Trial Court erred to the prejudice of Defendant-Appellant when it overruled his objection to the receipt in evidence as State's Exhibits Seventeen and Eighteen.

Proposition of Law No. 3

The Trial Court erred to the prejudice of Defendant-Appellant when it refused to give the standard instruction on accident to the jury.

Proposition of Law No. 4

The Trial Court erred as a matter of law when it failed to find the existence of one or more mitigating circumstances on behalf of Defendant-Appellant relative to the penalty to be imposed for the offense of aggravated murder.

COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-75374

ASSIGNMENTS OF ERROR FILED IN THE COURT OF APPEALS

First Assignment of Error

The Court erred to the prejudice of Defendant-Appellant in denying his motion to suppress his statement made to law enforcement officers in violation of his rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States of America.

Second Assignment of Error

The Trial Court erred to the prejudice of Defendant-Appellant when it overruled his objection to the receipt in evidence of State's Exhibits Seventeen and Eighteen.

Third Assignment of Error

The Trial Court erred to the prejudice of the Defendant when it refused to grant Defendant-Appellant's motion to dismiss the charges against him at the close of the State's case in chief.

Fourth Assignment of Error

The Trial Court erred to the prejudice of Defendant-Appellant when he refused to give the standard instruction on accident to the jury.

Fifth Assignment of Error

The Trial Court erred as a matter of law when it failed to find the existence of one or more mitigating circumstances on behalf of Defendant-Appellant relative to the penalty to be imposed for the offense of aggravated murder.